

No. 77-755

Supreme Court, U. S.

FILED

APR 15 1978

MICHAEL ROBAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1977

---

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., AND  
BULK CARRIER CONFERENCE, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

---

MEMORANDUM FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION

---

WADE H. MCCREE, JR.,  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

MARK L. EVANS,  
*General Counsel,*

HENRI F. RUSH,  
*Associate General Counsel,*  
*Interstate Commerce Commission,*  
*Washington, D.C. 20423.*

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1977

---

No. 77-755

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., AND  
BULK CARRIER CONFERENCE, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

---

**MEMORANDUM FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

---

1. The antitrust laws forbid any group of motor carriers to sit down together, to agree on the rates to be charged for transportation services, and to establish those rates collectively. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439. Congress has determined, however, that collective rate discussions by motor carriers sometimes are beneficial, and it therefore authorized the Interstate Commerce Commission to insulate rate bureaus from the antitrust laws, subject to certain constraints.

(1)

The Reed-Bulwinkle Act of 1948, 62 Stat. 472, 49 U.S.C. 5b, allows carriers to discuss and agree on rates; the agreements must be submitted to the Commission for approval. The rate bureaus themselves also must be approved by the Commission. Section 5b(2) provides that the Commission shall give its approval to rate bureaus and particular rates only if "the relief provided in paragraph (9) of this section should apply \* \* \*; otherwise the application shall be denied."<sup>1</sup> The same provision also specifies that the Commission may grant its approval "only upon such terms and conditions as the Commission may prescribe as necessary \* \* \*." Section 5b(7) authorizes the Commission to reexamine its approvals at any time, and to withdraw approval for any existing rate bureau or set any necessary conditions.

The Commission approved the formation and operation of petitioners many years ago. In late 1972 the Commission began a general investigation of the operation of rate bureaus; in so doing it responded to complaints that "the terms and structure of the agreements, and the operation of various ratemaking bureaus implementing the agreements, are not in furtherance of the national transportation policy as required by the act" (Pet. App. 6a). The Commission's formal investigation set out 28 areas of in-

<sup>1</sup> Section 5b(9), in turn, provides that the antitrust laws do not apply to any approved rate or rate bureau, "with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission."

quiry, including the questions (1) whether carriers that are affiliated with shippers may serve on the board of directors of rate bureaus; (2) whether rate bureaus should be allowed to file protests against rates filed by members of the particular bureau; and (3) whether rate bureaus should be allowed to operate for profit.

The Commission received extensive comments and issued its initial decision in 1975 (349 I.C.C. 811; Pet. App. 1a-51a).<sup>2</sup> The Commission adopted rules providing that rate bureaus, as conditions of retaining their immunity from the antitrust laws, must agree not to allow shipper-affiliated carriers to serve on their boards of directors, not to file protests against tariffs of their own members, and not to make a profit. All of these rules were challenged, and the petitions for review were consolidated for decision. The court of appeals upheld all three rules (559 F.2d 1251; Pet. App. 87a-100a).<sup>3</sup> The present petition for a writ of certiorari deals with the membership of shipper-affiliated carriers; the petition in No. 77-1190 deals with the filing of protests;<sup>4</sup> no carrier has sought review in this Court of the Com-

<sup>2</sup> The Commission denied a request for modification of its orders in the respects material here (351 I.C.C. 437; Pet. App. 53a-85a).

<sup>3</sup> The court granted rehearing on one issue and adhered to its decision (565 F.2d 290; No. 77-1190 Pet. App. 15a-16a).

<sup>4</sup> We are furnishing counsel for petitioners with copies of our response in No. 77-1190, and we are furnishing counsel for petitioners in No. 77-1190 with copies of this memorandum.

mission's requirement that rate bureaus not operate for profit.

2. The Commission acknowledged that it had not previously considered questions concerning membership of shipper-affiliated carriers in rate bureaus, pointing out that "the number of shipper-affiliated carriers has grown substantially in recent years, and that these carriers are members of ratemaking organizations and participate extensively in the rate-making process" (Pet. App. 17a). It stated that "[t]here is no question that affiliated carriers may become members of approved ratemaking organizations" (*ibid.*), and that only the role of the shipper-affiliated carriers within the rate bureaus was at issue. Because the Commission concluded that the participation of shipper-affiliated carriers on the board of directors of a rate bureau would "have an effect upon the ratemaking function of those bureaus which is contrary to the directives of the national transportation policy" (*id.* at 19a)—principally because the presence of affiliates of shippers would create "the appearance or possibility of malfeasance, misfeasance, undue influence or conflict" (*ibid.*)<sup>5</sup>—it ordered representatives of such carriers to obtain the Commission's permission before joining the rate bureaus'

<sup>5</sup> The possibility of conflict of interest arises because the interests of shippers—the parents of the shipper-affiliated carriers—are not congruent with the interests of carriers in general. The Commission stated that "documented examples of undue influence [were] revealed in our investigative reports" (Pet. App. 19a; see also *id.* at 62a).

boards of directors. The Commission adhered to this conclusion on reconsideration (*id.* at 61a-64a).

The court of appeals held that petitioners' challenge to this order is insubstantial. It concluded that the Commission has "full and complete authority to act as it did" (Pet. App. 95a) and that any hardship could be alleviated because the order permits exceptions on application to the Commission. The court explained (*id.* at 96a) that "the possibility of a conflict of interest is self-evident, \* \* \* [and] it appears rational for the Commission to prohibit shipper-affiliated carrier participation in those activities where the possibility of a conflict of interest is high, but to permit exemptions through Commission approval of bureau applications. The Commission adopted a stance which in effect, is a case by case disposition, rather than a general rule. We find that this procedure overcomes the petitioners' objection."

3. There is no reason for this Court to review the court of appeals' decision. The Commission's investigation discovered questionable practices in which shipper-affiliated carriers had influenced rate decisions in ways that gave evidence of conflict of interest (Pet. App. 19a, 62a). The potential for conflict of interest if subsidiaries of shippers participate in making collective decisions about the rates to be charged by carriers is evident. The Commission's rule establishes what is in effect a rebuttable presumption against the participation of shipper-affiliated carriers on the boards of directors of rate bu-



reaus. Participation is not barred, because carriers may seek permission from the Commission case by case to sit on boards of directors.<sup>6</sup> And shipper-affiliated carriers may remain as members of the rate bureaus. The order neither destroys nor unfairly burdens the bureaus; it simply ensures that they operate without conflicts of interest (see Pet. App. 95a-96a).

Petitioners contend, however, that the Commission's procedure for granting exceptions invites arbitrary action, because the Commission did not announce standards for the exercise of its discretion (Pet. 12). This contention is incorrect. There is a governing standard—the existence of a potential conflict of interest (see Pet. App. 96a). Moreover, the establishment of a procedure for case by case decision creates an opportunity for the Commission further to develop its standard in the light of the facts of particular cases. The Commission need not attempt to anticipate every possible situation that might arise. There will be time enough for complaint if the Commission should act arbitrarily in particular cases; there is no reason to prohibit the Commission from even beginning the process of developing more detailed rules. See *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202-203.

<sup>6</sup> Moreover, as the Commission pointed out (Pet. App. 62a-63a), even a total prohibition on participation on boards of directors would not substantially limit the right of shipper-affiliated carriers to participate in the collective ratemaking process.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,  
*Solicitor General.*

MARK L. EVANS,  
*General Counsel,*  
HENRI F. RUSH,  
*Associate General Counsel,*  
*Interstate Commerce Commission.*

APRIL 1978.